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No. 85-683

In the Supreme Court of the United States

October Term, 1985

KWANG-WEI HAN,

Petitioner,

v.

TONEY AND BRIGETTE PILATO,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

JUDGMENT AND OPINION BELOW

The judgment of the trial court, rendered in the Superior Court of California, County of Orange, against Petitioners is attached hereto as Appendix "A" and the trial Court's Minute Order to reduce the damage against Petitioner hereto is attached as Appendix "B". The

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[1]Toney and Brigette Pilato, Plaintiffs, Kwang-Wei Han, Irvine Safety Supply, Inc., Defendants, all parties inclusive.

opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division Three, which affirmed the lower Court's judgment is attached hereto as Appendix "C." The denial of Petitioner's Petition to the California Supreme Court is attached hereto as Appendix "D".

INTRODUCTION

Plaintiffs and responding parties Toney Pilato and Brigette Pilato, respectfully request that this Court *not* grant the Petition for Writ of Certiorari filed by Petitioner, Kwang-Wei Han herein.

The decision of the Court of Appeals affirming the award involving the actions of Mr. Han dba Han and Company was in complete accordance with the law and facts concerning this matter. Defendant and Appellant alleged before the jury, before the Appeals Court, before the Supreme Court of the State of California and now before the Supreme Court of the United States that an accounting error on a chart of $2,000.00, which was admitted as an error by Plaintiffs during the Trial and in front of the jury, somehow prejudiced his case. How it prejudiced his case is never explained. The Court of Appeals' opinion (CAO pages 13-14, 25-29), discusses this area in depth and I refer this august body to that discussion.

CONSTITUTIONAL PROVISION INVOLVED

Defendant and Appellant, Kwang-Wei Han asserts that Han, as an in pro per, was somehow abused due to the admitted accounting error having been initially made (even though corrected) at the Trial. Because of this alleged abuse, Appellant Han, for the first time, urged the Supreme Court of the State of California to set guidelines to safeguard the rights of persons who

are acting as a Pro Se. This was an entirely new matter, brought up for the first time before the Supreme Court of California for the purpose of bringing the matter under California Rules of Court, Rule 29(a)(1), attached hereto as Appendix "F".

STATEMENT OF THE CASE

In 1978 Petitioner Kwang-Wei Han entered into a business contract with Plaintiffs Toney Pilato and Brigette Pilato whereby the Pilatos put $40,000.00 into a savings account as collateral against the issuance by the bank of letters of credit ordered by them against that $40,000.00. It was intended by all parties that no more than $40,000.00 would be at risk or put up as collateral by the Pilatos.

The next step was that after a manufacturer was selected by Kwang-Wei Han and had received the letter of credit, that manufacturer would send a specified number of gloves to the Pilatos at the Han warehouse. The manufacturer would hold that letter of credit as a guarantee of payment on a specific date.

Mr. Han would then request from the Pilatos what gloves he needed and/or a customer would call in with what gloves that customer needed. The Pilatos in turn would issue that type and number of gloves to Han and Company and/or Irvine Safety Supply (an alter ego of Hans) depending upon which invoice was used. What gloves were to be sent out to whom was determined by Mr. Han.

The next step would be for Han, on his own, or on behalf of Irvine Safety Supply, to sell those gloves at a substantial markup, pay the Pilatos who in turn would pay off on the letters of credit.

The contract was to last for a period of two years and the Pilatos would receive an annual return of 20

percent of their investment from the resale of the gloves by Han.

During this next six months there were many difficulties with the contract. Although some of these difficulties were quite severe, no difficulty was considered by either party sufficiently significant that it would have caused either party to repudiate the contract, until December 9, 1978. At this time Mr. Han converted the Pilatos inventory of gloves taking complete control of same and eventually selling them without repaying the Pilatos, or giving them any accounting of what he had done. The opinion of the Court of Appeals spells out these surrounding facts in a great deal more detail and Respondents make reference and incorporate the findings of the Court of Appeal.

As Mr. Han points out in his Petition herein, this matter went to trial with Plaintiffs, Respondents, the Pilatos, being represented by F. Michael Woodland, Attorney at Law, Mr. Han in Pro Se and Irvine Safety Supply Incorporated being represented by attorney Dennis Orphan. It is once again pointed out that it has been judicially determined, and not appealed, that Irvine Safety Supply and Kwang-Wei Han were for all practical purposes one in the same.

During the trial an error of $2,000.00 was indeed made by F. Michael Woodland, attorney for Plaintiffs, when making out a chart in the last wee hours before trial. It was actually a double accounting error of $1,761.20 which Han was to have paid in cash for gloves taken by him over a $10,000.00 limit imposed by the contract, but which was never paid for and thus became credit. When indeed the $2,000.00 error was mathematically shown by Defendants, Plaintiffs agreed in open Court, that Petitioner Han's figures were correct and changed

the chart in open Court before the Judge and the jury. As to what difference this double accounting error makes, however, I do not know and neither did the Court of Appeals (CAO 13-14, 25-29). For up until the lockout of December 9, 1978, no act by any party to the contract was considered to be of sufficient importance to constitute a breach of that contract. All parties intended to continue on with the contract until Mr. Han converted the Pilatos gloves on that December 9, 1978 date.

How a simple accounting error made during trial and admitted during trial and corrected during trial can be a "deceit" or a "fraudulent action" by the "trained adversary attorney" has never been explained by Mr. Han. In front of the jury it was admitted by Plaintiffs that Mr. Han's figures were correct concerning this $2,000.00 issue. The jury was informed how the error was made. More importantly however, Respondents did not rely on the alleged overage of Han of $2,000.00 when claiming breach of contract. As pointed out by the Court of Appeals and as pointed out numerous times by Respondents, all breaches of the contract prior to December 9, 1978 were forgiven by both parties. This is merely one of those situations where, at last, Mr. Han found an error made by the Plaintiffs, Respondents, herein and like a bulldog won't let go of that error despite the fact that all of this was thoroughly hashed over in the trial, in the Appeal, and despite the fact that Mr. Han was in no way damaged by this error. This particular error is simply the only thing that Mr. Han has found to grab hold of that Plaintiffs did that was less than perfect.

REASONS FOR DENYING THE WRIT

The judgment rendered against Petitioner was not as a result of anything that Plaintiffs did through the trial

by way of false testimony and/or fraudulent evidence. The error was thoroughly gone over in front of the jury and explained. (CAO 13-14, 25-29).

Again it is respectfully pointed out to this Court that at no time does Petitioner explain what, if any, activity by Plaintiffs and their attorney abused Mr. Han. Again I repeat, how could any harm be done to Mr. Han by an admitted accounting error of which the jury was completely informed?

What is most interesting concerning this allegation by Han, however, is that Han is a Pro Se only in that he does not have a license to practice law. He is not unschooled in law as he would have this Court believe.

Throughout this litigation Mr. Han had an attorney in one form or another. It should be noted by the Court that Irvine Safety Supply, who was found by jury and the Court of Appeals to be merely an alter ego of Hans was represented at all times by the attorney who was paid by Mr. Han and directed by Mr. Han and consulted with by Mr. Han. At the trial it was Mr. Dennis Orphan who was that attorney. It is interesting to note, however, the sequence of events throughout this proceeding concerning Mr. Han's attorneys. The following is an accounting of the various attorneys involved from the beginning of this matter, all paid for by Mr. Han either by himself, or one of his companies.

KWANG-WEI HAN, (AN INDIVIDUAL)

1. Mr. Han admitted that at the time of the Writ of Attachment he was consulting with Attorney Albert Nasser.

2. The Complaint was answered by Kwang-Wei Han in Pro Se.

3. April 6, 1981 Kwang-Wei Han was substituted out and Attorney Patricia A. Duncan, of the law offices of Robert L. Nelms was substituted in as attorney of record for Mr. Han as an individual.

4. July 17, 1981 Patricia A. Duncan and the law offices of Robert L. Nelms were substituted out and Kwang-Wei Han was substituted back in as attorney of record.

5. August 24, 1981, Kwang-Wei Han was substituted out and Earl J. Dumont of the law offices of Dumont, Hatchion & Parker was substituted in.

6. September 4, 1981, Attorney Dumont was substituted out and Kwang-Wei Han was substituted back as attorney of record.

7. March 3, 1982, Kwang-Wei Han was substituted out and Attorney Dumont was substituted back in.

8. For the Appeal the law offices of Hansen, Bridgett, Marcus, Vlahos & Stromberg, in the person of Winslow Christian were substituted in and Kwang-Wei Han was substituted out.

9. March 9, 1984, Winslow Christian and his law firm were substituted out and Kwang-Wei Han was substituted back in.

10. As should be pointed out to this Court, even after Mr. Han was substituted back in during the Appeal, attorneys were writing some of his briefs for him.

IRVINE SAFETY SUPPLY (AN ALTER EGO OF HANS AND CO-DEFENDANT)

1. Albert Nasser answered the Complaint on behalf of Irvine Safety Supply and is admitted by Han to be the attorney consulted by him even before this suit was filed.

2. Albert Nasser was substituted out and Han substituted himself in for Irvine Safety Supply on January 7, 1980. (It should be noted that Irvine Safety Supply was a corporation and Mr. Han was attempting to represent that corporation).

3. The law firm of Dougherty, Elekes & Carol appeared on June 29, 1981, for Irvine Safety Supply as their attorneys.

4. February 26, 1982, Dennis Orphan was substituted in place of Dougherty, Elekes & Carol. Dennis Orphan remained on that case in ostensible representation of Irvine Safety Supply throughout the trial, throughout the various motions for new trial and throughout the appeal.

More interesting than all of this, however, is that Mr. Han may well be one of the most legally experienced individuals in Orange County, California. Attached hereto as Appendix "E" (four pages) are photocopies of just the Orange County records of suit (Plaintiff, Defendant indexes) filings where Mr. Kwang-Wei Han, or one of his subsidiaries or alter egos was a Plaintiff or Defendant. As can be seen from this Court record, Kwang-Wei Han has probably had more Court experience than most of the attorneys who presently practice law. In most of these lawsuits, shown in the document attached, Mr. Han was Pro Se at one time or another therein.

The Court might find it interesting to note that on the date this appeal was argued before the Court of Appeal, Mr. Han was not only to the Appeals Court on this matter, but was arguing another appeal on the same day on another matter. From the record, an uncharitable person might conclude that Mr. Kwang-Wei Han is a one man wrecking crew attempting to clog the Orange County Court system.

It should further be pointed out to this Court that as a result of Mr. Han's being "Pro Se" that on all occasions throughout this entire matter the Courts have forgiven his missed filing dates, failures to supply records, hearsay testimony and all other manner of "errors" be they accidental or deliberate by Mr. Han. Throughout the trial Mr. Han's side was allowed one attorney in the person of Mr. Orphan and Mr. Han both arguing the same matters, both cross-examining, etc., all to the disadvantage of Plaintiffs herein. If there has been any abuse it has been the Courts accommodation of Mr. Han's deliberate, calculated strategy of using his status as a Pro Se to gain Court assistance and procedural advantage. I believe it is necessary and incumbent upon me to point out to this Court Mr. Han's true status as a "Pro Se".

CONCLUSION

This matter has been litigated over and over and over by Mr. Han. He has delayed the payments to the Pilatos of that which he has owed them for almost eight years. He utilized their monies and turned it over and over for almost eight years without paying a dime. The Pilatos have been delayed, have been forced to pay attorney's fees to the point that they will probably never get back their original investment. All of this time Mr. Han has been benefitting. There has indeed been a travesty of justice herein. It has been Mr. Han's manipulation of the Court system to prevent or delay justice. The Court of Appeals denied sanctions but if there is any way that they can be given, Respondents request them.

At the conclusion of his Petition, Mr. Han states that there is a saying "evil will flourish if good people do

not do anything." It is respectfully submitted that Mr. Han is not "good people".

Respectfully submitted,

F. MICHAEL WOODLAND

Attorney for Respondents
TONEY AND BRIGETTE PILATO

APPENDIX

APPENDIX A

Judgment on Verdict in Open Court.

Superior Court of the State of California, County of Orange.

Toney Pilato and Brigitte Pilato, Plaintiff, vs. Kwang-Wei Han, Irvine Safety Supply, Inc., and Does 1 through 10, inclusive, Defendants. No. 30-64-11.

Filed: January 30, 1979.

This cause came on regularly for trial before the above-entitled Court on April 6, 1982, the Honorable Mark A. Soden, Judge presiding, with a jury, in Department 25, F. Michael Woodland appearing as attorney for plaintiffs and defendant, Kwang-Wei Han, appearing in propria persona, and Dennis Orphan appearing as attorney for defendant, Irvine Safety Supply, Inc. and a jury of 12 persons was regularly impaneled and sworn to try the action. Witnesses on the part of the plaintiffs and the defendants

were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into Court, and being called answered to their names and duly rendered their verdict in writing in words and figures as follows, to-wit:

"TITLE OF COURT AND CAUSE" We, the jury in the above entitled action, find for the Plaintiffs named below and give damages as set opposite the names as follows: Plaintiffs Toney Pilato and Brigitte Pilato Compensatory Damages $28,635.00, Interest $13,947.00 Punitive Damages $12,500.00, Total Damages $55,082.00. As to said Plaintiffs, our findings and award of damages are against the Defendant or Defendants: KWANG-WEI HAN and IRVINE SAFETY SUPPLY, INC. DATED: 19 April 82 John C. Olsa, III, Foreman."

APPENDIX B

Minute Order by the Trial Court

Superior Court of the State of California, County of Orange.

Toney Pilato and Brigitte Pilato, Plaintiff, vs. Kwang-Wei Han, Irvine Safety Supply, Inc., and Does 1 through 10, inclusive, Defendants. No. 30-64-11.

Filed: January 30, 1979.

This cause came on regularly for trial before the above-entitled Court on April 6, 1982, the Honorable Mark A. Soden, Judge presiding, with a jury, in Department 25, F. Michael Woodland appearing as attorney for plaintiffs and defendant, Kwang-Wei Han, appearing in propria persona, and Dennis Orphan appearing as attorney for defendant, Irvine Safety Supply, Inc.

After the jury's verdict was entered on April 19, 1982, the defendants moved for a

New Trial, the Court now makes its ruling as follows:

"The above Motion for a New Trial having been taken under submission, the Court now makes its ruling as follows:

The Court finds that the Pilatos paid $14,874 for gloves ordered by Han; that the contract provided for additional payments of $12,000 for a total of $26,874 and that plaintiffs are only entitled to interest provided by law on that sum from the date of the jury verdict, April 9, 1982; that a reasonable sum for punitive damages is the sum of $8,000; therefore, a new trial is granted on the ground of excessive damages, subject to the condition that the motion for a new trial is denied if the plaintiffs consent to a reduction of the verdict and notifies defendants in writing on or before July 20, 1982 that plaintiffs will accept the

sum of $34,874 with interest at the legal rate from April 19, 1982 until the judgment is paid plus costs of suit.

ENTERED: 7-2-82

MARK A. SODEN

Judge of the Superior Court

APPENDIX C

Opinion of Court of Appeal

In the Court of Appeal of the State of California, Fourth Appellate District, Division Three.

Toney and Brigitte Pilato, Plaintiffs, Cross-Defendants and Respondents, vs. Kwang-Wei Han, Irvine Safety Supply, Inc., and Does 1 through 10, inclusive, Defendants, Cross-Complainants and Appellants. No. G000159 (Super. Ct. No. 30-64-11).

Filed: May 14, 1985.

APPEAL from a judgment of the Superior Court of Orange County, Mark A. Soden, Judge. Affirmed.

Kwang-Wei Han, in pro. per., for Defendant, Cross-Complainant and Appellant.

Dennis P. Orphan, for Defendant, Cross-Complainant and Appellant Irvine Safety

Supply, Inc.

Parkin & Woodland, Inc., F. Michael Woodland, for Plaintiffs, Cross-Defendants and Respondents Toney and Brigitte Pilato.

In March 1978 Han, designated "Buyer," entered into a contract with the Pilatos as "Seller." The Pilatos were to place $40,000 in a savings account as collateral for letters of credit they issued for the purchase of gloves to be eventually resold by Han. The aggregate amount of outstanding letters of credit was not to exceed $40,000. Each would be addressed to a particular manufacturer for a specific type and quantity of gloves, to be determined solely by Han. The gloves could be withdrawn for resale by Han in value increments not to exceed $10,000. When that amount was repaid he was entitled to an additional $10,000 worth on open account. He was also permitted to

purchase outright from the Pilatos for cash in the event he had reached his credit limit.

The Pilatos directed all gloves delivered to Han's warehouse, where they were separately stored and clearly marked "Toney Pilato." The contract stated Han agreed "that [the Pilatos] may store such industrial gloves as have not been withdrawn by [Han], in a locked area, the key to which shall be in the possession of [the Pilatos]." Title to the gloves in the locked area remained in the Pilatos until they received full payment for them.

Upon receipt of the stated $10,000 payments or the cash, the Pilatos were to purchase replacement gloves as designated by Han. They were granted the unrestricted right to enter the locked area without notice to Han and to take

inventory. Additionally, Han agreed to pay $16,000 to the Pilatos, in $4,000 increments, in September of 1978, March and September of 1979, and March of 1980. He further agreed to pay all costs and expenses in excess of the actual purchase price of the gloves.

By the end of May, letters of credit had been issued totalling $15,837. In July, Mrs. Pilato was hired by Han as an office worker; one of her assignments was to track the Pilato inventory and prepare new letters of credit when appropriate. In August, Han paid $10,000 toward his first series of withdrawals and the first $4,000 payment. By the end of September, the Pilatos had covered four of the original five letters of credit (totalling $9,915.60, leaving Han with an $85 credit in the business account). One $5,922 document, due in December, was still

outstanding. Four additional letters of credit had been issued in the amounts of $9,240 (July), $1,240 (Aug. 7), $18,793.20 (Aug. 24) and $4,394 (Sept. 20), resulting in a total of $39,420.40.

By the same date, Han had withdrawn $9,818 worth of gloves on credit. He then proceeded to request cash purchases. Three transactions, totalling $4,967.20 were allowed by Mrs. Pilato and reimbursed by Han shortly after each withdrawal. A fourth transaction, encompassing withdrawals from November 3 through the end of the month, and totalling $1,761.20, was not reimbursed prior to December 9.

On December 9, the Pilatos arrived at the warehouse to take inventory of their remaining stock. An altercation arose with Han who claimed the Pilatos threatened to remove all the stock. The

Pilatos denied any such threat or intention: rather they asked him to please not request more withdrawals when he was already over his limit. Han did not interfere with the inventory check, but did call the police. When the Pilatos exited the locked area they were ordered from the premises. Han immediately had the locks changed and refused the Pilatos entry unless supervised. They were not allowed a key. One supervised entry was allowed on December 15 and inventory was valued at $22,958.08 wholesale.

Subsequent to the lockout, the $5,922 letter of credit became due and was covered by the Pilatos ($84.40 excess in business account, $4,967.20 cash from Han, $870.40 out-of-pocket by Pilato). By letter on the same date, Han sent $820.40 as repayment for his personal expense in that letter of credit. Thereafter on December 26, Han paid $18,793.20 (the

amount of the letter of credit due on that date); the check bounced but was later replaced and the letter of credit was covered on January 4 (nine days late). The three remaining letters of credit were paid by the Pilatos in February and March of 1980 ($14,874).

The Pilatos filed suit in January for breach of contract, fraud and conversion,[1/] naming as defendants Han and Irvine Safety Supply, a company owned by Han's sister and located in the same warehouse as Han & Co. Irvine's motion for summary judgment was denied. Following trial by jury, a verdict was rendered against both defendants in the amount of $55,082 ($28,635, compensatory; $13,947, interest; and $12,500, punitive). Following notice of motion for new trial,

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1/ The fraud case of action was dismissed.

the court granted the motion on the ground of excessive damages, subject to its denial if the Pilatos consented to the verdict's reduction to $38,874 ($26,874, compensatory; $8,000, punitive). The Pilatos consented and both defendants appeal.

HAN'S APPEAL

I

Han claims he had "not breached the contract by selling gloves beyond the authorized level." He cites testimony by Mrs. Pilato that he was $2,000 over his $10,000 limit in late September. However, the Pilatos admitted at trial there was an error in their assessment, and consequently in the chart prepared by their attorney. Thus, Han was not over his limit as of that date, although he was "about $1,761 over his limit" (Han's

opening brief) on December 9. The issue is irrelevant in any event as both parties testified at trial no deviation from the contract was considered material prior to December 9, 1978.

II

Han next states "the Pilatos claim the contract won't work"; he then insists it is a workable contract as evidenced by the conduct of the parties in the issuance and repayment of the first letters of credit: numbers 1, 2, 3 and 5 were repaid through Han's August 7, $10,000 payment (81-112 days early).

He contends this is proof the contract will work and belies the Pilatos' testimony at trial. He states the Pilatos claimed the "contract would not work [because] 'there was no way he [Han] could pay for the letter of credit in 180

days.'" However, the true answer given at trial by Mr. Pilato was "that there was no way we [the Pilatos] were going to be able to meet these letters of credit payments as they became due at the bank."

Their concern was well-founded; many of the letters of credit were due considerably less than 180 days from issuance, while Han granted himself 180 days to repay the Pilatos after withdrawal of a $10,000 increment. Again, the issue is moot. All letters of credit were timely paid prior to the lockout and all parties agreed there was no concern worthy of legal action prior to that date.

III

Han contends the Pilatos breached the contract because they received the $4,967 cash payment for gloves and did not immediately issue new letters of credit.

Three obstacles block his recovery. First, he had not repaid the final "outright for cash" withdrawal ($1,761); second, he testified at trial he considered no problem prior to the lockout (December 9) sufficient to constitute a breach; and third, the collateral limit had been reached by the then outstanding letters of credit. No new ones could be issued.

Moreover, letter of credit number 4, issued in May, was due December 11. Mr. Pilato testified Han told him to use the $4,967 for that purpose. Although Han testified he didn't remember any discussion whereby he agreed to guarantee that all letters of credit would be paid on time, he did admit his payments toward the December 11 due date for letter of credit number 4 were made with that in mind. He in fact wrote to the Pilatos on

the 11th of December, itemizing the payments he had made to date (including the $4,967 which he now claims should have been used for repurchase) and enclosing a check for the balance of $820.40 as "total payment due [from Han] on December 11, 1978, Letter of Credit . . . ."[2/]

In his deposition, the following colloquy occurred:

"A What was finally decided? What did you decide concerning the hundred eighty days in the subsequent discussion? Was there any change made? Anything that you told him? [¶] A I think -- I think I believe -- I think I believe we moved the payment day earlier. I am not sure.

2/ Letter of Credit number 4, $5,922, repaid as follows:

$4,967.20	Han's cash purchase
84.40	business account balance
820.40	December 11 check from Han
$5,872.00	

The letter of credit was actually covered by the Pilatos' personal check for $870.40 because Han's reimbursement was in error.

Yeah. I'm not sure [¶] Q Do you remember how much earlier? [¶] A I think -- I think sometimes several months earlier. I'm not completely sure of just exactly what it was. I believe there is something in my mind, somebody -- there was something we changed somewhat."

While Han claims he asked Mrs. Pilato to complete additional letters of credit for the $4,967.20, the Pilatos denied this occurred. No orders could be placed until Han selected the quantity and type of gloves he wished as well as the appropriate manufacturer. The Pilatos testified Han never notified them of his choices; rather, he agreed the November cash payments should be utilized to cover the letter of credit due December 11. Moreover, no additional letters of credit could be issued -- all parties agree the outstanding credit totaled $39,420.20 on

the date of the lockout.

IV

Han next claims the lockout was not a breach of contract on his part because 1) it was necessary to "preserve evidence that he did not steal any gloves"; 2) "he had the exclusive right to withdraw the gloves"; and 3) "he was responsible for the security of the gloves." The jury clearly disagreed with his version of the December 9 incident and chose to believe the Pilatos, who testified they did not threaten to remove the glove stock, merely wishing to inventory as was their right.

The Pilatos admit there was an argument when Mr. Pilato asked Han to "get off his wife's back" about asking for withdrawal of more gloves when he did not immediately pay for them in cash (at a time when he had already reached his $10,000 credit

limit). All parties agree Han at that point had in his possession $9,858 worth of gloves withdrawn on credit plus those of $1,761 value he had withdrawn on a "cash" basis, which remained unpaid. The Saturday checkup occurred because Mrs. Pilato was not there on weekends "for [Han] to ask if he can take [gloves]."

Han, himself, testified prior to the lockout Mrs. Pilato held the key to the Pilato stock and he "solely let her control the thing." On the 9th he called a locksmith to change the locks, did not give the Pilatos a key and informed his employees not to allow them in the warehouse. Mrs. Pilato was not employed by Han after that date.

Thereafter, without the Pilatos' permission, he sold the stock at an admitted profit ranging from 50 to well over 100%. Han perhaps misunderstands our

role on appeal. Our power "begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact. . . . The trier of fact is the sole arbiter of all conflicts in the evidence, conflicting interpretations thereof, and conflicting inferences which reasonably may be drawn therefrom; is the sole judge of the credibility of the witnesses; may disbelieve them even though they are uncontradicted if there is any rational ground for doing so, one such reason being the interest of the witnesses in the case; . . ." (Horn v. Oh (1983) 147 Cal.App.3d 1094, 1099, emphasis added.) Our review of the entire record discloses substantial evidence to support the jury's determination Han had no basis for locking out the Pilatos and appropriating their inventory.

V

Han insists there was no conversion "because there was nothing to convert," i.e., he continued to pay the letters of credit. We disagree. Han's conversion occurred on December 9 and the payments to which he refers were made after[3/] he locked out the Pilatos and refused to give them a key. He took dominion and control over the entire stock, none of which did he have a right to withdraw on the 9th because he had not made "payment to the Seller of [the] preceding increment of $10,000." (Paragraph 2 of the contract.) He then proceeded, without the Pilatos' permission, to sell the entire stock.

3/ He met only one of the outstanding letters of credit (excluding the $820 remitted to reimburse the Pilatos on number 4), and the damages were reduced by the amount of those payments. Acceptance of these sums by the Pilatos amounts to little more than mitigation of damages.

"'Conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein. It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use.'

. . . [¶] It is clear that legal title to property is not a requisite to maintain an action for damages in conversion. To mandate a conversion action 'it is not essential that plaintiff shall be the absolute owner of the property converted but she must show that she was entitled to immediate possession at the time of conversion.'" (Hartford Financial Corp. v Burns (1979) 96 Cal.App.3d 591, 598.)

The Pilatos were to retain title until

repaid for the gloves. They alone were entitled to the keys to the locked area where the gloves were stored. Absent a valid reason or privilege for denying them access to their gloves, Han's assertion of dominion and control (admitted in his declaration attached to Irvine Safety Supply's motion for summary judgment) constitutes an act of conversion.

VI

For the reasons discussed ante we need not address Han's insistence he substantially performed the contract and the Pilatos were the breaching parties.4/

4/ Although not raised by the defendants, we find the compensatory damages amply supported by the evidence. The jury instructions are not in the record and the verdict returned by the jury does not indicate upon which cause of action liability was predicated. Nor does it indicate their method for arriving at the compensatory damage total. It was
(Footnote continued on next page)

VIII

Han filed a supplemental brief which states the following issue: "The corroboration of testimony of the

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apparently based on the conversion resulting from Han's breach.

When the court reduced damages, it stated by minute order, "The Pilatos paid $14,874 for gloves ordered by Han [and] the contract provided for additional payments of $12,000 for a total of $26,874 . . . [A] reasonable sum for punitive damages is the sum of $8,000 . . . ." To the extent there appears any ambiguity, defendants are not entitled to relief. First, they did not raise the issue in the trial court or on appeal and are deemed to have waived it.

Second, "where proof [of conversion] establishes an injury beyond that which would be adequately compensated by the value of the property and interest, the court may award such amounts as will indemnify for all proximate reasonable loss caused by the wrongful act." (Lint v. Chisholm (1981) 121 Cal.App.3d 615, 624-625.)

Third, and most importantly, the judgment can be upheld purely on the conversion cause of action. In Mayes v. Sturdy Northern Sales, Inc. (1979) 91 Cal.App.3d 69, appellants attacked a "judgment because of ambiguities about the theory upon which the court based its decision." The appellate court stated, "It is well established that if a trial court's decision is 'right upon any theory

(Footnote continued on next page)

plaintiff, Mrs. Pilato, with her attorney in open court during trial to cover up a mistake or error for the sole purpose of influencing the jury may constitute collusion which is a prejudicial error." He also filed an augmentation of the record: a reporter's transcript of opening and closing arguments, to which he makes no reference.

His entire argument is a reiteration of the point addressed in Paragraph I above. However, the thrust now is collusion between Mrs. Pilato and her attorney, i.e., false testimony that Han had withdrawn over his limit on September 30.

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of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' [Citations.] The factual issues presented below were the same for either theory of recovery [contract and tort], and appellants were given ample opportunity to present their version of the business transactions among the parties." (Id., at p. 83.)

He relies on the chart of events prepared by the Pilatos' attorney. There was an error in the value of the gloves Han held on September 30. Mrs. Pilato admitted the amount on the chart for the date of September 30 was incorrect and agreed to Han's figure of $9,818; she did not know the origin of the $2,000 discrepancy.

Her attorney then asked her, "In compiling all these figure, that is the final compilation, they were given to me in rough; is that not correct?" [Answer, "Yes."] "I made out the chart; is that not correct?" [Answer, "Yes."] Han finds this colloquy "highly prejudicial." He states, "To say the least, it was inappropriate for [the attorney] to raise such questions because he knew they were based on false evidence. It was unmistakeably an intentional false

testimony for the sole purpose of trying to impress the jury that what the Pilatos did wrong was not willful. But, because [the attorney] had the wrong material from Mrs. Pilato he made out the wrong chart, and he made a wrong accusation. Had they simply admitted their mistake by saying their error was an accounting error, there would be no question raised today." (Emphasis added.) He then refers to the chart and claims the majority of the figures are "precise" and therefore cannot be "approximate" as stated by the attorney.

We find no evidence of collusion. Nor can we feel the jury was inflamed by the word "approximation." Moreover, the Pilatos' admission of error in the chart could only work to Han's advantage. The jury might well have inferred if they were incorrect in that matter, their other

testimony was open to question. However, the credibility of witnesses is an issue for the trier of fact. In any event, Han cross examinated Mrs. Pilato at length on the disputed figure which in the final analysis is irrelevant -- as noted, ante, all parties agreed no condition prior to December 9 was sufficiently bothersome to warrant discontinuing the contract.

APPEAL BY IRVINE SUPPLY

Irvine argues there was insufficient evidence to support an award of damages against it, insisting it was not a party to the Han-Pilato contract and Han was not its agent in the transaction. The Pilatos claim the evidence shows Han and Irvine were so intermingled from the corporation's inception that all Han's activities, and particularly his actions on December 9, were also those of Irvine. The jury agreed and substantial evidence appears to support its determination.

Jane Han was the titular president and sole shareholder of Irvine, incorporated about the time the Han-Pilato contract was negotiated. Her deposition states she purchased from her brother the right to sell gloves in a certain territory, an asset she transferred to the corporation. She stated she paid $2,000 to him but had

"misplaced" all receipts or contracts which would corroborate the transaction. Han then acted as salesman and general manager for the first year to establish the business (during the life of the Han-Pilato contract.)

Mrs. Pilato was hired by Han in July 1978. Her salary, however, was paid from the Irvine account and Han informed her she was an employee of both Irvine and Han & Co. She was in fact sole secretary for both. Her paychecks usually bore the name "Jane Han" but were always pre-signed. Han testified he didn't remember if he signed for her.5/ When glove orders were taken Han instructed her which invoices to utilize, either Han & Co. or Irvine. However, Mrs. Pilato testified the orders

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5/ After Mrs. Pilato left his employ, Han testified, he hired another girl who also "help[ed] with Irvine Safety as well. It is a family affair. (Emphasis added.)

were filled with the same supply of gloves, including the Pilatos' inventory.

During the entire time she was employed at the warehouse, in which the two companies were located, Mrs. Pilato at no time saw, met or spoke to Jane Han. Although he denied it at trial, Han, in an earlier deposition, had stated he provided all costs for the incorporation of Irvine Safety Supply. Moreover, when asked at trial if he had paid the Pilatos for letters of credit, using Irvine Safety Supply checks, he replied, "I don't know. Maybe. I don't know. I definitely do not know. I definitely think -- I don't know."

There is sufficient evidence in the record from which the jury could conclude that Han was in fact the undisclosed agent of Irvine Safety Supply and that his actions at all times were taken for its

benefit as well as his own.6/

6/ Irvine also claims the court erred in denying its motion for summary judgment. In light of our discussion above, the issue is moot. Irvine received a trial on the merits of its contention there was no agency relationship with Han. We have reviewed and affirmed the jury's determination.

Although we need not decide the issue, we question whether a denial of a summary judgment, which is not an appealable order, may be reviewed on its merits following appeal from judgment after trial.

SANCTIONS

The Pilatos have requested sanctions for a frivolous appeal. We are aware of, and sympathize with, the number of responses they have been obliged to prepare. However, "to avoid a serious chilling effect on the assertion of litigants' rights," Han has "a right to present issues that are arguably correct, even if it is extremely unlikely that [he] will win on appeal. An appeal that is simple without merit is not by definition frivolous and should not incur sanctions." (In re Marriage of Flaherty (1982) 31 Cal.3d 637, 650.)

The judgment is affirmed. Respondents to receive costs.

s/SONENSHINE
SONENSHINE, J.

WE CONCUR;

s/TROTTER
TROTTER, P.J.

s/WALLIN
WALLIN, J.

APPENDIX D

Clerk's Office, Supreme Court, 4250 State Building, San Francisco, California 94102.

July 24, 1985.

I have this day filed Order REVIEW DENIED.

In re: #G000159, TONY PILATO AND BRIGITTE PILATO vs. KWANG-WEI HAN.

Respectfully,

Clerk

APPENDIX E

ORANGE COUNTY, CALIFORNIA

FILINGS FROM JANUARY 1, 1968 THROUGH DECEMBER 31, 1980

DATE OF FILING	CASE NUMBER	DEFENDANT SURNAME	GIVEN NAME	PREPARED 01 25 81	
02/16/79	307491	HAN	KWANG-WEI		
03/20/80	331113	HAN	KWANG-WEI	ETC	
04/06/79	310678	HAN	KWANG-WEI		ET AL
06/13/78	292144	HAN	KWANG-WEI		
09/05/75	234164	HAN	KWANG-WEI		
04/06/79	310678	HAN FOOD COMPANY			ET AL
03/20/80	331113	HAN FOOD SERVICE		ETC	
03/20/80	331113	HAN & COMPANY		ETC	
04/06/79	310578	HAN & COMPANY			ET AL
09/07/79	319955	HAN	JANE		ET AL
03/02/73	200336	HAN	KWAN WEI		ET AL
01/30/79	306411	HAN	KWANG W		ET AL
09/07/79	319955	HAN	KWANG W		ET AL
01/09/75	223180	HAN	KWANG WEI	ETC	
05/30/74	214924	HAN	KWANG WEI		
07/26/76	250475	HAN	KWANG WEI	ETC	ET AL
08/18/77	274388	HAN	KWANG WEI	ETC	ET AL
09/16/76	253481	HAN	KWANG WEI		ET AL
11/07/77	278813	HAN	KWANG WEI		
01/20/75	223615	HAN	KWANG-WEI	ETC	ET AL
01/31/77	262104	HAN	KWANG-WEI	ETC	
02/19/75	225017	HAN	KWANG-WEI	ETC	ET AL
02/22/79	307805	HAN	KWANG-WEI		ET AL
03/09/77	264478	HAN	KWANG-WEI		ET AL
03/10/75	225861	HAN	KWANG-WEI		ET AL
04/04/77	266142	HAN	KWANG-WEI		ET AL
04/11/77	266505	HAN	KWANG-WEI	ETC	ET AL
06/24/77	271117	HAN	KWANG-WEI	ETC	ET AL

ORANGE COUNTY, CALIFORNIA

FILINGS FROM JANUARY 1, 1986 THROUGH DECEMBER 31, 1980

FIRST NAMED PLAINTIFF			CASE
SURNAME	GIVEN NAME		DISPO
PILATO	TONEY	ET AL	PRI
MUNICIPAL COURT -	HARBOR JUDICIAL		PRI
GENERAL AMERICAN L	IFE INSURANCE C	ET AL	PRI
FAR EAST NATIONAL	BANK	ET AL	PRI
HAIGHT, LYON, SMITH	& DICKSON	ET AL	
GENERAL AMERICAN L	IFE INSURANCE C	ET AL	PRI
MUNICIPAL COURT -	HARBOR JUDICIAL		PRI
MUNICIPAL COURT -	HARBOR JUDICIAL		PRI
GENERAL AMERICAN L	IFE INSURANCE C	ET AL	PRI
M J H CLEARINGS IN	C		PRI
PUGLIESE	SALVATORE	ETC	
PILATO	TONEY	ET AL	PRI
M J H CLEARINGS IN	C		PRI
RATH	SAMUEL W	ETC	
T & H EQUIPMENT CO,	INC		
HOUSTON CITIZENS BAN	K & TRUST COMPANY	ETC	
CENTURY GLOVE CORP	ORATION	ETC	
TOM THUMB GLOVE CO,	INC		
WESTLANDS BANK			
PACIFIC SOUTHWEST AI	R-CONDITIONING, INC	ETC	
COX	ROBERT J	ETC	
CON ROCK CO		ETC	
IRVINE NATIONAL BA	NK		PRI
KUMAGLOVE COMPANY		ETC ET AL	
R J NOBLE COMPANY		ETC	
CHAMBERS	LEWIS C	ET AL	
YRISARRI	FRANCIS X		
YRISARRI	FRANCIS X		

07/25/78	294718	HAN	KWANG-WEI	ET AL
08/07/74	217438	HAN	KWANG-WEI	ET AL
10/11/79	321832	HAN	KWANG-WEI	ET AL
10/11/79	321831	HAN	KWANG-WEI	ET AL
10/16/75	236207	HAN	KWANG-WEI	ET AL
03/02/73	200336	HAN AND COMPANY		ET AL
08/07/74	217438	HAN AND COMPANY		ET AL
01/14/74	210277	HAN & CO		ET AL
01/20/75	223615	HAN & COMPANY	ETC	ET AL
01/31/77	262104	HAN & COMPANY	ETC	
02/22/79	307805	HAN & COMPANY		ET AL
03/09/77	264478	HAN & COMPANY		ET AL
04/04/77	266142	HAN & COMPANY		ET AL
04/11/77	266505	HAN & COMPANY	ETC	ET AL
06/24/77	271117	HAN & COMPANY	ETC	ET AL
07/25/78	294718	HAN & COMPANY		ET AL
07/26/76	250475	HAN & COMPANY	ETC	ET AL
08/18/77	274388	HAN & COMPANY	ETC	ET AL
09/07/79	319955	HAN & COMPANY		ET AL
09/16/76	253481	HAN & COMPANY		ET AL
10/11/79	321832	HAN & COMPANY		ET AL
04/11/77	266505	HAN & COMPANY/SAFE TY PRODUCTS, IN	ETC	ET AL
06/24/77	271117	HAN & COMPANY/SAFE TY PRODUCTS, IN	ETC	ET AL
08/27/81	351895	HAN	JANE	ET AL
07/08/82	382121	HAN	JANE	
01/31/84	421424	HAN	KWANG	ET AL
02/16/79	307491	HAN	KWANG-WEI	
02/27/81	351295	HAN	KWANG-WEI	ET AL
03/20/80	331113	HAN	KWANG-WEI	ETC
04/06/79	310678	HAN	KWANG-WEI	ET AL
06/13/78	292144	HAN	KWANG-WEI	

HUTCHINS	D		PRI
POE	JERRY L	ETC	
UNITED PARCEL SERV	ICE		PRI
UNITED PARCEL SERV	ICE		PRI
CONDER	ORVAL	ET AL	
			PRI
PUGLIESE	SALVATORE	ETC	
POE	JERRY L	ETC	
BURKE CONCRETE ACCES	SOREIS, INC		
PACIFIC SOUTHWEST AI	R-CONDITIONING, INC	ETC	
COX	ROBERT J	ETC	
IRVINE NATIONAL BA	NK		PRI
KUMAGLOVE COMPANY		ETC ET AL	
CHAMBERS	LEWIS C	ET AL	
YRISARRI	FRANCIS X		
YRISARRI	FRANCIS X		
HUTCHINS	D		PRI
HOUSTON CITIZENS BAN	K & TRUST COMPANY	ETC	
CENTURY GLOVE CORP	ORATION	ETC	
M J H CLEARINGS IN	C		PRI
TOM THUMB GLOVE CO.	INC		
UNITED PARCEL SERV	ICE		PRI
YRISARRI	FRANCIS X		
YRISARRI	FRANCIS X		
PARISO	DOMINIC	ET AL	PRI
GENERAL AMERICAN L	IFE INSURANCE C	ET AL	PRI
WOSTENBERG	DAVID	ET AL	PRI
PILATO	TONEY	ET AL	PRI
PARISO	DOMINIC	ET AL	PRI
MUNICIPAL COURT -	HARBOR JUDICIAL		PRI
GENERAL AMERICAN L	IFE INSURANCE C	ET AL	PRI
FAR EAST NATIONAL	BANK	ET AL	PRI

APPENDIX F

CALIFORNIA RULES OF COURT
RULE 29. GROUNDS FOR REVIEW IN SUPREME COURT

(a)(Grounds) Review by the Supreme Court of a decision of a Court of Appeal will be ordered (1) where it appears necessary to secure uniformity of decision or the settlement of important questions of law; (2) where the Court of Appeal was without jurisdiction of the cause; or (3) where, because of disqualification or other reason, the decision of the Court of Appeal lacks the concurrence of the required majority of qualified judges (As amended effective May 6, 1985; previously amended effective November 11, 1966).

(b)(Limitations) As a matter of policy, on petition for review the Supreme Court normally will not consider:

(1) any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal;

(2) any issue or any material fact that was omitted from or misstated in the opinion of the Court of Appeal, unless the omission or misstatement was called to the attention of the Court of Appeal in a petition for rehearing. All other issues and facts may be presented in the petition for review without the necessity of filing a petition for rehearing. (As amended effective May 6, 1985; previously amended effective November 11, 1970, and January 1, 1983.)

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on December 2, 1985, I served the within *Response to Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Kwang-Wei Han
Post Office Box 10701
Santa Ana, California 92711

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 2, 1985, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)